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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

IN THE MATTER OF

RULES FOR IMPLEMENTING  
FILTERING REQUIREMENTS OF THE  
CIPA AS APPLIED TO PUBLIC  
LIBRARIES UNDER

CC DOCKET NO. 96-45

*United States v. American Library Ass'n*

SUPPLEMENTAL COMMENTS  
OF AMERICAN CENTER FOR LAW AND JUSTICE

Respectfully submitted,

AMERICAN CENTER FOR LAW  
AND JUSTICE

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## INTRODUCTION

The American Center for Law and Justice (ACLJ) is a nonprofit, public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ submitted its original Comments in the captioned docket on February 15, 2001, and now is supplementing those comments in light of the Supreme Court's recent decision in *United States v. ALA*, No. 02-361, 539 U.S. \_\_\_, 2003 U.S. LEXIS 4799 (U.S. June 23, 2003).

**I. UNDER CIPA, FEDERALLY-FUNDED LIBRARIES BOTH MAY AND HAVE A DUTY TO INSURE THAT INTERNET FILTERING IS NOT DISABLED SO AS TO INCLUDE ACCESS TO OBSCENITY, CHILD PORNOGRAPHY, OR RESULT IN EXPOSURE OF MINORS TO HARMFUL CONTENT.**

Notwithstanding CIPA's filter disabling provision, adults are not free to enjoy unfiltered Internet access in a federally-funded public library to access obscenity or child pornography. Specifically, the Children's Internet Protection Act (CIPA), codified as 20 U.S.C. § 9134, provides in subsection (f) that a public library cannot receive federal funding for discount Internet access unless such library

has in place a policy of Internet safety that includes . . . a technology protection measure that . . . protects against access through [the library's] computers to visual depictions that are obscene; or child pornography; and is enforcing the operation of such technology protection measure during any use of such computers.

(Emphasis added). In considering this provision, the Supreme Court recently noted in *United States v. ALA* that "[u]nder CIPA, a public library may not receive federal assistance to provide Internet access unless in installs software to block images that constitute obscenity or child pornography, or to prevent minors from obtaining access to material that is harmful to them." *Id.* at \*10-\*11 (emphasis added). Thus, both CIPA itself and the Supreme Court require public libraries receiving

federal funding to block out material that constitutes obscenity and child pornography from access by both adults and minors.

Although subsections (f) and (h) of CIPA provide that an "administrator, supervisor, or other authority may disable a technology protection measure [filtering device] to enable access for bona fide research or other lawful purposes," this exception is a narrow one. The exception must be read together with the above prohibition of obscenity and child pornography and against the background of the current law regarding public availability of such material.

In particular, unless an adult requesting unfiltered access is engaged in a "bona fide research" (such as, e.g., researching how certain sexually explicit material contributes to the incidence of violent sexual crimes), such an adult is limited by CIPA to seek such access only for "lawful purposes." 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D). "Lawful purposes" does not, under current law, include an adult's viewing of obscenity and child pornography in a public library.

Obscenity and child pornography are forms of speech unprotected by the Constitution and laws. *See Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973). As a result, those forms of speech can be prohibited from public places, and one's right to freely possess or receive such material is limited to one's own private residence. *See Stanley v. Georgia*, 394 U.S. 557 (1969); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) ("protection [to possess obscene material] afforded by *Stanley v. Georgia* is restricted to a place, the home"). A public library, of course, is not such a private residence, but a public place.

With regard to public places, including public libraries, the "States have a long-recognized legitimate interest in regulating the use of obscene material in . . . all places of public accommodation." *Slaton*, 413 U.S. at 57. This is because the "States have the power to make a

morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' right . . . to maintain a decent society." *Id.* at 69.

Further, the government can adopt a specific definition of obscenity with regard to minors, even though the material might not be obscene in terms of an adult audience. *See Ginsberg v. New York*, 390 U.S. 629 (1968). Minors do not have the right to receive indecent material that is harmful to them. Government's interest in protecting physical and psychological well-being of minors "extends to shielding minors from the influence of [material] that is not obscene by adult standards." *Sable v. FCC*, 492 U.S. 115, 126 (1988).

Thus, since CIPA requires that unrestricted access to adults in federally-funded libraries be given only for "lawful purposes," libraries can, and indeed, have a duty to, ascertain whether an adult requesting unfiltered access intends to use it for a purpose that is not unlawful under local, state and federal law. Neither CIPA itself nor its interpretation by the Supreme Court, along with other relevant precedent, allows unblocking of a website or disabling a filter altogether merely "at the request of any adult user." Rather, such unblocking can only take place after the library has ensured that the unfiltered access will not be used for an unlawful purpose, such as viewing obscenity or child pornography, and will not result in exposing minors to material deemed harmful to them by law.

## **II. CIPA'S FILTER DISABLING EXCEPTION DOES NOT APPLY TO MINORS, AND LOCAL LAW CAN REQUIRE THAT ONLY COMPUTERS DESIGNATED FOR ADULT USE CAN HAVE A FILTER DISABLING OPTION.**

The ALA has made a statement that in certain federally-funded libraries, "CIPA's disabling

provision applies to all internet access, including access by minors."<sup>1</sup> This statement distorts the law and completely ignores the "lawful purpose" limitation to the filter disabling provision of the Act. While subsection (f)(3) does not specify whether a filter can be disabled only during use by an adult, this apparent defect is virtually cured by the "lawful purpose" language in the same provision. A filter cannot be disabled, except for a "lawful purpose," and in most jurisdictions, allowing a minor to access obscene or even indecent material (not obscene by adult standards) is unlawful. *See, e.g., Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a New York statute banning the sale of sexually oriented material to minors, even though the material was entitled to First Amendment protection with respect to adults).

Indeed, the government has a compelling interest in protecting the physical and psychological well-being of minors, *Sable v. FCC*, 492 U.S. 115, 126 (1988), and the position that children can make choices concerning pornography is not only counter-intuitive, but illegal in most jurisdictions. On the contrary, "during the formative years of childhood and adolescence, minors often lack experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443, U.S. 622, 635 (1979). Taking account of these considerations, CIPA, at a minimum, does not require computers used for access by children to have an option of disabling internet filters, and local law most likely would forbid such disabling.

## CONCLUSION

For these reasons, we respectfully request that the FCC promulgate rules that comply with the language of CIPA, its interpretation by the Supreme Court, and with other relevant law, as

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<sup>1</sup>*CIPA Legal FAQs* at:

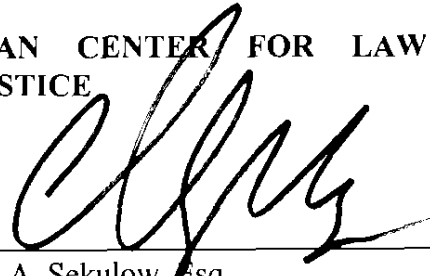
[http://www.ala.org/Content/NavigationMenu/Our\\_Association/Offices/ALA\\_Washington/Issues/2/Civil\\_Liberties,\\_Intellectual\\_Freedom,\\_Privacy/CIPA1/legalfaq.htm](http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/ALA_Washington/Issues/2/Civil_Liberties,_Intellectual_Freedom,_Privacy/CIPA1/legalfaq.htm)

discussed herein. Requests for unblocking specific websites must be limited to unblocking only those sites that do not contain obscenity, child pornography or other unprotected material. Requests to disable filtering must be granted only on condition that the subsequent use will not involve any unlawful purpose, such as viewing obscenity, child pornography, and other such material by an adult, or viewing any indecent material by a minor or exposing a minor to such material by an adult, as proscribed by local, state, and federal law.

Respectfully submitted,

**AMERICAN CENTER FOR LAW AND  
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